RECORD AND BRIEFS.

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In the
Supreme Court of the United States

LESTER GERARD PACKINGHAM,
Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of North Carolina

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

To confront the threat sexual predators pose to children, the North Carolina Legislature enacted a statute that forbids registered sex offenders from accessing "commercial social networking Web sites" that permit minors to become members. N.C. Gen. Stat. §14-202.5. Petitioner, a registered sex offender, was convicted of violating the statute by creating and accessing a Facebook page. Facebook's terms of use expressly forbid convicted sex offenders from using the site. The question presented is:

Whether the North Carolina Supreme Court correctly held, applying intermediate scrutiny, that the prosecution of petitioner under §14-202.5 did not violate the First Amendment.

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INTRODUCTION

"Sex offenders are a serious threat in this Nation." *Conn. Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (internal quotation marks omitted). This Court has recognized that victims of sexual assault are most often juveniles, and that "when convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sex assault." *Id.* North Carolina, like all other States, has responded to these facts by adopting statutes designed "to protect its communities from sex offenders and to help apprehend repeat sex offenders." *Id.*

Sexual predators' use of the Internet has created special challenges to society as it attempts to protect its most vulnerable members. The Internet does not merely allow predators to communicate more easily with children whom they stalk. It also allows them to gain intimate information about children's social lives, families, hobbies, and hangouts. Predators then use that information to target an unwitting victim, either in person or online, under the guise of familiarity or shared interests.

North Carolina enacted N.C. Gen. Stat. §14-202.5 to thwart that conduct. It does so by barring registered sex offenders from using the subset of social networking sites that can provide predators with the opportunity to obtain personal information

about children. Like other nonpunitive statutes imposing restrictive measures on sex offenders adjudged to be dangerous, it imposes criminal penalties for its violation. *See Smith v. Doe*, 538 U.S. 84 (2003); *see also Kennedy v. Louisiana*, 554 U.S. 407, 457-58 & n.5 (2008) (Alito, J., dissenting) (noting various measures developing across the country to respond to the problem of child sexual abuse). Petitioner does not, and cannot, dispute that he is a registered sex offender subject to §14-202.5; that Facebook is one of the websites the statute bars him from using; that he violated the statute by creating a profile page on Facebook; and that Facebook independently bars him from accessing the site based on his prior conviction as a sex offender. His First Amendment challenge to §14-202.5, as applied to him and facially, failed in the North Carolina state courts. It does not merit further review.

To assess the statute's validity, the North Carolina Supreme Court applied the intermediate-scrutiny test set out in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)—the very test petitioner would apply. The court's application of that well-established test does not conflict with the decisions of other courts that have addressed "social media" bans, all of which involved statutes imposing broader bans. Nor does the court's decision create any other meaningful conflict with another appellate court.

Petitioner is also a poor candidate to challenge §14-202.5, for he is objecting to a state ban on accessing a website that he had no legal right to access even absent the law. Nor can he take refuge in the statute's alleged vagueness, for he used a social networking site to which the statute unquestionably applies. Petitioner also failed to introduce evidence needed to assess his claim that the statute's alleged unconstitutional applications are substantial in comparison to its legitimate sweep.

In the end, petitioner's complaint boils down to a vociferous insistence that the North Carolina Supreme Court did not properly apply the *Ward* test. That error-correction claim fails on its own terms. Petitioner suggests a series of "less restrictive" alternatives, but none would protect children until it is too late—thereby defeating the very purpose of the statute. He also relies on faulty crime statistics that fail to support his counter-intuitive contention that convicted sex offenders pose no more threat to children than anyone else. Lastly, petitioner's claim that he lacks ample alternative channels of communication rests on an interpretation of that test that would defeat virtually any challenged statute. And it ignores the countless websites that §14-202.5 leaves open to registered sex offenders. Certiorari should be denied.

STATEMENT

A. Statutory Background.

In 1995, the North Carolina Legislature enacted North Carolina's "Sex Offender Registration Program" in an effort to protect minors from sexual predators. *See* N.C. Sess. Laws 1995-545; N.C. Gen. Stat. §14-208.5 *et seq*. The legislation detailed its purpose, specifically noting "that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment" and that "persons who commit certain other types of offenses against minors, such as kidnapping, pose significant and unacceptable threats to the public safety and welfare or the children in this State." N.C. Gen. Stat. §14-208.5. The legislation stated that its purpose was "to assist law enforcement agencies' efforts to protect communities" from such offenses. *Id*.

North Carolina's sex offender registry applies to sex offenders who have committed crimes against minors and those who have committed "sexually violent offenses." The registerable offenses in the latter category that could pertain to either minor or adult victims are:

- First degree rape;
- Second degree rape;

- First degree forcible sexual offense (engaging in a sexual act against another person by force and there are additional aggravating factors);
- Second degree forcible sexual offense (engaging in a sexual act with another person by force or with a person who is mentally disabled, mentally incapacitated, or physically helpless);
- Sexual battery (engaging in sexual contact with another person by force or with a person who is mentally disabled, mentally incapacitated, or physically helpless);
- Subjecting or maintaining a person for sexual servitude;
- Incest between near relatives; and
- Promoting the prostitution of or patronizing a prostitute who is a minor or mentally disabled person.

See id. §§14-208.6(4)(a), (5).[1] A registered sex offender may petition to be removed from the registry after 10 years of registration, but unless his

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[1] *See also* N.C. Department of Justice, Law Enforcement Liaison Section, *The North Carolina Sex Offender & Public Protection Registration Programs* 4-5 (Sept. 2014). Two of the registrable offenses relate to sexual activity by school personnel with a "student" of a primary or secondary school. The vast majority of such students are, of course, minors.

petition is granted the sex offender must remain on the registry for 30 years. *Id.* §14-208.6A.

In 2008, in an additional effort to confront the problem of sexual predators, the General Assembly enacted the statute at issue here—N.C. Gen. Stat. §14-202.5 ("Ban use of commercial social networking Web sites by sex offenders"). This legislation forbids registered sex offenders from accessing certain "commercial social networking Web sites" that minors frequent. *See id.* Through §14-202.5, North Carolina sought to address the menace of registered sex offenders compensating for lack of direct physical access by seeking out new, unsuspecting victims via "cyberspace." Through this modern method, a sex offender can remain invisible on a social networking site while gaining intimate and detailed information about children who use the site. Offenders use that information to prey on those children.

To convict a registered sex offender for violating §14-202.5, the State must show that the offender accessed a commercial social networking website where the offender knows the site permits minor children to become members or to create personal web pages on the site. *Id.* §14-202.5(a). The State further must establish that the site possesses the following attributes:

— It is a private, commercial, revenue-producing site. *Id.* §14-202.5(b)(1).

— It is a "social networking site" that allows for the social introduction between people. *Id.* §14-202.5(b)(2).

— It is a site that allows users to create pages or profiles that are capable of containing the user's name or nickname, photographs, other personal information, and links to other personal web pages on the site belonging to friends or associates. *Id.* §14-202.5(b)(3).

— It is a site that provides its users at least one mechanism to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger. *Id.* §14-202.5(b)(4).

Access to any websites that do not meet *all* of these criteria is not restricted under the statute. *See id.* §14-202.5(b). In addition, unlike the "social media bans" at issue in the federal cases relied upon by petitioner, North Carolina's statute exempts from its reach any site that "[p]rovides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform." *Id.* §14-202.5(c)(1). Nor does the statute apply to a site that "[h]as as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors." *Id.* §14-202.5(c)(2).

B. Facts.

On May 20, 2002, a Grand Jury in Cabarrus County, North Carolina indicted petitioner, then 21 years old, on two counts of statutory rape of a 13-year-old child. *See* Cabarrus County File Nos. 02 CRS 8475 and 02 CRS 8476. Pursuant to a plea bargain, petitioner entered a plea of guilty to taking indecent liberties with a child. *See* Cabarrus County Super. Ct., Judgment, No. 02CRS008475 (Sept. 16, 2002). Upon petitioner's conviction, he was ordered to register as a sex offender. (R. 72)[2]

In April 2010, Corporal Brian Schnee, a supervisor in the juvenile investigation division of the Durham, North Carolina Police Department, was working to identify registered sex offenders who were illegally accessing commercial social networking websites. (Tr. 132)[3] While perusing Facebook, Officer Schnee found a user profile page that (based on the profile photo) he believed belonged to petitioner—whom Schnee had previously determined was a registered sex offender living in Durham. (Tr. 132-34) On the Facebook page,

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[2] Citations to "R. ___" refer to the printed Record on Appeal, filed in the North Carolina Court of Appeals.

[3] Citations to "Tr. __" refer to the transcript of the trial proceedings in Durham County, North Carolina Superior Court.

petitioner was using the fictitious name "J.r. Gerrard" instead of his own name. (Tr. 133-34; R. 77)

Petitioner had posted a message on Facebook on April 27, 2010, praising God in the wake of dismissal of a traffic citation. (Tr. 134-35) Officer Schnee went to the Durham County Clerk of Court's office and obtained a certified copy of the citation and dismissal dated April 27, 2010. (Tr. 135-36) Based on this and additional information confirming that "J.r. Gerrard" was in fact petitioner, Officer Schnee obtained a search warrant for petitioner's residence. (Tr. 142)

During the search, Officer Schnee found and seized a picture of petitioner which was the same picture the officer had seen on the Facebook page; as well as other items corroborating petitioner's identity as the person who had opened and used a Facebook account. (Tr. 152, 153, 157) Officer Schnee also seized a notice of "Changes to the North Carolina Sex Offender Registration Laws," which petitioner had signed, describing the websites that §14-202.5 prohibited him from accessing. (Tr. 155-56)

C. Lower Court Proceedings.

1. Petitioner was indicted for violating N.C. Gen. Stat. §14-202.5. At trial, he moved to dismiss on the ground that the statute violated his First Amendment right to free speech. The trial court denied the motion (Pet. App. 54a-65a), and the North Carolina Court of Appeals denied his request for

interlocutory review. Following a trial, a jury convicted petitioner.

2. Petitioner appealed to the North Carolina Court of Appeals, which reversed the conviction. (*Id.* 35a-53a) The Court of Appeals ruled that §14-202.5 is a content-neutral speech regulation subject to intermediate scrutiny. And although it found "that the State has a significant interest in protecting minors from predatory behavior by sex offenders on the internet" (*id.* 46a), the court concluded that the statute is not narrowly tailored because it applies to sex offenders whose offenses involved adults and therefore might not be "a current threat to minors" (*id.* 48a).

The Court of Appeals also ruled that §14-202.5 is unconstitutionally vague. Disregarding limiting constructions proposed by the State, the court found that "the statute could be interpreted to ban registered sex offenders from accessing sites such as Google.com and Amazon.com." (*Id.* 51a) In its vagueness analysis, the court did not address whether petitioner's conduct—accessing Facebook—was clearly proscribed.

3. The North Carolina Supreme Court reversed, holding that §14-202.5 does not violate the First Amendment or the Due Process Clause. (*Id.* 1a-27a) The court stated that, although social networking websites provide both a forum for gathering

information and a means of communication, the essential purpose of §14-202.5 is to limit sex offenders' conduct, namely, "access[ing] certain carefully-defined Web sites." (*Id.* 9a) After finding that the statute is content-neutral, the court concluded that it should be assessed under the four-part intermediate-scrutiny test set out in *United States v. O'Brien*, 391 U.S. 367 (1968). (*Id.* 12a)

The court noted that the parties agreed that the statute satisfied the first two factors of the *O'Brien* test: whether the statute is within the government's constitutional powers and whether it furthers a substantial government interest. The court next ruled that the statute satisfies the third *O'Brien* factor, which asks whether the government interest is unrelated to the suppression of free expression. The court found that the statute's purpose is to "protect[ ] children from convicted sex offenders who could harvest information to facilitate contact with potential victims," an interest "unrelated to the suppression of free speech." (*Id.* 13a-14a)

The court then focused on the fourth *O'Brien* factor, which the court found to be the same as the test set forth in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989): whether the statute is narrowly tailored and leaves open "ample alternative channels for communication." (Pet. 42a) Applying that test, the North Carolina Supreme Court concluded that §14-202.5 is narrowly tailored. The court observed

that the statute contains specific exceptions for websites that provide discrete e-mail, chat room, photo-sharing, and instant messaging services. And it found that, even assuming petitioner's broad reading of the statute, it "leave[s] open ample alternative channels for communication." (*Id.* 16a (quoting *Ward*, 491 U.S. at 791)). The court pointed to the types of sites expressly excluded by the statute and the myriad other sites that do not fall within its terms. The court further noted that non-web-based methods of communication such as text messaging, FaceTime, and electronic mail remain open to petitioner.

After distinguishing the statutes struck down in a few other jurisdictions (*id.* 18a-19a), the North Carolina Supreme Court rejected petitioner's as-applied, overbreadth, and vagueness challenges. As to overbreadth, the court found that "the statute is drafted carefully to limit its reach by establishing four criteria that must be met before access to a commercial social networking Web site is prohibited" —factors which "ensure that registered sex offenders are prohibited from accessing only those Web sites where they could actually gather information about minors to target." (*Id.* 25a) As to vagueness, the court held that such a challenge "cannot be raised by a defendant"—such as petitioner—"whose conduct falls squarely within the scope of the statute." (*Id.* 27a)

REASONS FOR DENYING THE PETITION

I. THE NORTH CAROLINA SUPREME COURT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER APPELLATE COURTS.

Petitioner's contention that the North Carolina Supreme Court's decision conflicts with various federal court decisions falls short on multiple grounds. Only three of the cited decisions actually involved challenges to social-networking media bans—and only one of those was issued by an appellate court. All are readily distinguishable. Petitioner cites several other decisions as purportedly conflicting with some of the North Carolina Supreme Court's *reasoning*. But even if such a conflict were worthy of this Court's review—and it is not—the particular reasoning in question did not affect the outcome of this case. Still other decisions offered by petitioner involved statutes and orders even farther afield from this case. No genuine conflict among the appellate courts exists.

A. North Carolina's statute differs from the state social networking bans other courts have addressed.

1. Only one appellate court has struck down a "social media" ban, and that case addressed a state law that differed from §14-202.5 in significant ways—ways the court itself recognized may prove

decisive. In *Doe v. Prosecutor, Marion County*, 705 F.3d 694 (7th Cir. 2013), the Seventh Circuit invalidated an Indiana law that banned sex offenders' use of social networking sites. *See* Ind. Code §35-42-4-12. The Indiana law, however, was broader in scope than North Carolina's law and narrower in purpose.

Indiana's law solely "target[ed] the evil of improper communications with minors." *Marion County*, 705 F.3d at 695. The State therefore agreed that a sex offender's use of social media is not a problem the statute seeks to address "as long as he does not improperly communicate with minors." *Id.* at 699. The purpose of North Carolina's statute is quite different. It does not merely regulate the actual contact a sex offender might ultimately make with a victim. Rather, North Carolina recognized the additional danger of sex offenders' increasing use of social networking sites to troll for victims, which requires time spent on certain fertile sites before any actual contact is ever made.[4] It is this protective purpose that North Carolina's statute seeks to achieve.

The Seventh Circuit in *Marion County* recognized the importance of the different statutory

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[4] *See, e.g.*, Online Predators/Internet Predators, http://www.minormonitor.com/resource/online-predators/ (March 14, 2012) (discussing predators' use of online tools to target victims) (last visited June 29, 2016).

objectives, and expressly reserved whether the outcome might be different if the state law were enacted to serve the broader purpose served by North Carolina's law. Thus, the court stated:

> [W]e do not foreclose the possibility that keeping certain sex offenders off social networks advances the state's interest in ways distinct from the existing justifications. For example, perpetrators may take time to seek out minors they will later solicit. This initial step requires time spent on social networking websites before the solicitation occurs.

Id. at 701. And when a State enacts a law designed to serve that objective, the court will have to revisit the constitutional issue:

> In the future, the state may argue that prohibiting the use of social networking allows law enforcement to swoop in and arrest perpetrators before they have the opportunity to send actual solicitation. This argument remains speculative.

Id. In short, said the court, its analysis was limited to the rationale and legislation before it, and its decision "should not be read to limit the legislature's ability to craft constitutional solutions to this modern-day challenge." *Id.* Petitioner disregards that admonition, and the Seventh Circuit's express reservation, when he nonetheless insists that the

court's decision conflicts with the North Carolina Supreme Court's decision.

On top of that, the scope of the statutes at issue in the two cases differed. In keeping with Indiana's express purpose of regulating the actual contact a sex offender might have with a minor, its "social media ban" was broadly written to cover virtually every Internet site imaginable, and amounted to a near-complete Internet ban. *See id.* at 698; Ind. Code §35-42-4-12 (prohibiting use of "a social networking website or an instant messaging or chat room program"). By contrast, as discussed, North Carolina's statute focuses only on sites that allow for posting of personal identifying information and allow the users to link to others' personal pages. It expressly exempts sites that provide only single, discrete communications features, which would not allow the user to invisibly use them or invisibly ferret out vast personal information from other users. *See* N.C. Gen. Stat. §14-202.5(c)(1). The purported conflict between the North Carolina Supreme Court decision and *Marion County* is illusory.

2. The other two decisions striking down social-media bans are *Doe v. Jindal*, 853 F. Supp. 2d 596, 607 (M.D. La. 2012), and *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1112 (D. Neb. 2012). As an initial matter, of course, a conflict between an appellate court and a federal district court is not the sort of the

conflict that warrants a grant of certiorari. *See* Stephen M. Shapiro et al., *Supreme Court Practice* §4.8, at 257 (10th ed. 2013). In any event, the state statutes at issue in those two cases, like the Indiana statute reviewed in *Marion County*, were far broader in scope than §14-202.5.

Thus, the Louisiana statute at issue in *Jindal* prohibited use of "social networking websites, chat rooms, and peer-to-peer networks." La. Rev. Stat. Ann. §14:91.5. The Nebraska statute at issue in *Nebraska* prohibited use of "a social networking website, instant messaging, or chat room service." Neb. Rev. Stat. §28-322.05. Neither contained the broad exception set forth in N.C. Gen. Stat. §14-202.5(c). The effect of those statutes was to foreclose the Internet as a medium of speech for sex offenders. *See Jindal*, 853 F. Supp. 2d at 607; *Nebraska*, 898 F. Supp. 2d at 1117. That is neither the purpose nor the effect of North Carolina's legislation.

Moreover, as noted by the North Carolina Supreme Court, after the district court declared Louisiana's statute unconstitutional in *Jindal*, the Louisiana legislature amended its statute, making it similar to North Carolina's statute. (Pet. App. 19a (citing La. Rev. Stat. Ann. §14:91.5)). The amended Louisiana statute changed the name from "social media" to "social networking," added that the use must be "intentional," removed "chat rooms and peer-to-peer networks," and excepted many sites that

were previously banned, such as "websites that only offer photo sharing, email, or instant messaging." *(Id.)* The new version of Louisiana's statute has not come under constitutional attack, and already has been viewed as "likely narrowly tailored to the significant government interest of protecting children from sex offenders on the Internet." Comment: *Why Don't You Take a Seat Away from that Computer?: Why Louisiana Revised Statute 14:91.2 Is Unconstitutional*, 73 La. L. Rev. 883, 883-84 (2013) (analyzing the prior version of the Louisiana statute, while noting that the amended version does not suffer from the same defects). North Carolina's statute, as written, already is narrowed in all of those ways.

B. The other lower court decisions upon which petitioner relies do not remotely create a conflict worthy of this Court's review.

Lacking a genuine and direct conflict, petitioner —perhaps believing in quantity over quality—points to a variety of appellate decisions *not* involving social-media statutes which supposedly conflict in some way with the North Carolina Supreme Court's reasoning. None creates a conflict meriting this Court's review.

First, petitioner points to cases holding that a law limiting use of Internet sites should be analyzed

as a speech regulation, not (as the North Carolina Supreme Court ruled) as a regulation of conduct. (Pet. 28) But as discussed further in §II, *infra*, the North Carolina Supreme Court assessed §14-202.5 under the *Ward* test—the precise test used in the cases that supposedly conflict with its decision and the precise test petitioner would apply. *See Doe v. Harris*, 772 F.3d 563, 576-77 (9th Cir. 2014) (applying *Ward*); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1131-35 (10th Cir. 2012) (same); *Marion County*, 705 F.3d at 698-99 (same).

Petitioner next relies on several decisions striking down "measures requiring registrants to provide their 'internet identifiers' to the government." (Pet. 30) But these decisions were based upon the principle of anonymous speech, and turned on the fact that the statutes at issue effectively gave law enforcement unfettered discretion to disclose the identifying information to the public, thus chilling the registrants' right to speak anonymously on the entire Internet. As petitioner concedes, the other federal court of appeals to address such a law upheld it, because this concern was absent. (*Id.* n.11 (citing *Doe v. Shurtleff*, 628 F.3d 1217 (10th Cir. 2010) (upholding "Internet identifier" regulation that limited law enforcement's sharing of the identifiers to other law enforcement agencies and did not allow for disclosure to the public at large)).

Finally, petitioner relies on cases rejecting conditions of supervised release that barred convicted sex offenders from accessing *the entire Internet* and, in two of the cases, even using a computer. (Pet. 31-32) Suffice to say, a sweeping ban on access to the entire Internet—let alone a ban on using a computer—is far less tailored and far harder to justify than the more limited ban imposed by §14-202.5.

* * * * *

The only lesson that can be drawn from the assortment of cases offered by petitioner is that states and judges are struggling with the best way of addressing the challenge of sexual offenders' recidivism and the threat they pose to children. The statutes, regulations, and release conditions they adopt will vary from state to state and judge to judge; some will be upheld and some will be struck down. There may even be some occasional tension between rulings. But for the moment, the courts are all applying settled First Amendment jurisprudence to the specific laws and conditions before them, reaching results that can be easily reconciled. There is no pressing need for this Court's intervention.

II. THE NORTH CAROLINA SUPREME COURT'S APPLICATION OF INTERMEDIATE SCRUTINY TO N.C. GEN. STAT. §14-202.5 DOES NOT MERIT THIS COURT'S REVIEW.

Once all the smoke has cleared, the petition can be seen for what it really is: a disagreement with a state court's application of well-settled law to a little-copied statute in a case with an undeveloped record and in which many of the alleged problems with the statute are not present.

1. The first section of the petition (at 13-18) is devoted to contesting the North Carolina Supreme Court's conclusion that §14-202.5 regulates conduct, not speech. Whether the court got that right is an interesting question—but it has absolutely no bearing on the outcome of the case. After ruling that §14-202.5 regulates conduct, the North Carolina Supreme went on to apply the *O'Brien* test to assess its constitutionality. And as the court recognized, this Court stated in *Ward* "that the *O'Brien* test 'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.'" 491 U.S. at 798 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984)).

Consistent with that understanding, the North Carolina Supreme Court expressly found that the

fourth *O'Brien* factor embodies the *Ward* test for assessing content-neutral statutes, which asks whether the law is "narrowly tailored to achieve a significant governmental interest" and "leave[s] open ample alternative channels for communication of the information." (Pet. 42a (quoting *Ward*, 491 U.S. at 791)). That is the very test petitioner would apply to §14-202.5 (*see id.* 18), for he does not argue that §14-202.5 is content-based and subject to strict scrutiny (*see id.* 18 n.4).[5]

To be sure, petitioner stridently disagrees with the North Carolina Supreme Court's application of *Ward*. But his fulminations cannot change the fact that this is *all* that is at issue here. *See Supreme Court Practice, supra*, §6.37(i)(3), at 507 ("The Court will not ordinarily entertain cases involving" errors "'consist[ing] of the misapplication of a properly stated rule of law.'").

2. There are additional prudential reasons why this case does not merit further review. Petitioner asserts an as-applied challenge to §14-202.5, yet that challenge suffers from flaws specific to his case. Petitioner was convicted for creating and accessing a Facebook page. He has never disputed that Facebook is clearly covered by the statute. Any

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[5] Petitioner later suggests (at 34) that §14-202.5 discriminates based on the identity of the speaker, but when setting out his merits argument he relies solely on the *Ward* test. (*See* Pet. 18-26)

uncertainty about the scope of the statute cannot excuse his behavior.

More importantly, Facebook expressly bars convicted sex offenders from its site. Its terms of service expressly declare that: "You will not use Facebook if you are a convicted sex offender." Facebook.com, Terms of Service, Statement of Rights and Responsibilities, Registration and Account, item 6, www.facebook.com/legal/terms. Facebook's ban on sex offenders is no fortuity or technicality. The Attorneys General of 49 states investigated Facebook and MySpace out of concern that sexual predators were using those sites to stalk children. The investigations led to agreements between the Attorneys General and the two social networking sites under which the sites agreed to take a series of steps to better protect children from predators.[6]

As applied in this case, therefore, §14-202.5 did not bar petitioner from accessing any website he was otherwise permitted to access. He was barred from Facebook regardless. Even if the statute were not on

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[6] *See* Joint Statement on Key Principles of Social Networking Sites Safety (Jan. 14, 2008) (MySpace), *available at* http://www.ncdoj.gov/getattachment/78eac9be-5ee9-4ffe-b2fb-1e76da3a4574/MySpace-Agreement-Joint-Statement-on-Key-Princip.aspx; Joint Statement on Key Principles of Social Networking Sites Safety (May 8, 2008) (Facebook), *available at* http://www.nj.gov/oag/newsreleases08/Facebook-Joint-Statement.pdf.

the books, petitioner had no right to take advantage of what his amici (at 7) insist is a "uniquely effective form of communication." Put another way, when it comes to Facebook, petitioner cannot demonstrate "the existence of a traditional right of access." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984).

Petitioner insists that Facebook's own ban on convicted sex offenders is of no moment because §14-202.5 does not "impose[] *criminal* punishment for violating private agreements with website operators." (Pet. 25 n.7) That misses the point. As applied in his case, §14-202.5 barred petitioner from accessing a website he had no legal right to access. *Cf. Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (holding, in lawsuit brought by person threatened with arrest for attempting to distribute handbills at a shopping mall in violation of the mall's policy, that the policy did not violate the First Amendment). It surely is a strange First Amendment claim to say that the State is suppressing speech the speaker had no independent lawful right to make. At the very least, petitioner is a poor representative of the class of individuals supposedly burdened by §14-202.5.

3. This flaw in petitioner's case affects his facial challenge as well. In *United States v. Stevens*, 559 U.S. 460 (2010), the Court explained that "[t]o succeed in a" facial challenge "[i]n the First Amendment context," a claimant must show

overbreadth—*i.e.*, that "a substantial number of [the statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* at 472-73 (internal quotation marks omitted).[7] Social networking sites that independently bar convicted sex offenders complicate making that assessment here.

The person challenging a statute as overbroad "bears the burden of demonstrating, from the text of [the law] and from actual fact, that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (internal quotation marks omitted). Yet petitioner has provided no evidence regarding what percentage of the social networking "market" is already out of bounds to convicted sex offenders. Petitioner also suggests (at 20) that §14-202.5 is overbroad because it applies to sex offenders who committed crimes against adults, not minors—but here too failed to provide any evidence regarding the proportion of registered offenders falling within that category. Nor has petitioner documented what percentage of registered sex offenders are on parole, probation, or supervised release, a category he recognizes are "entitled to *less* robust constitutional protections." (Pet. 27)

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[7] Petitioner asserts that his "facial challenge should succeed without resort to the overbreadth doctrine[ ]" (Pet. 27 n.9), but does not reconcile that view with *Stevens*.

All told, this case is an exceedingly poor vehicle through which to address the constitutionality of §14-202.5, even if the Court thought the issue might one day warrant its consideration.

III. THE NORTH CAROLINA SUPREME COURT'S DECISION WAS CORRECT.

The North Carolina Supreme correctly concluded that §14-202.5 is "narrowly tailored to achieve a significant governmental interest" and "leave[s] open ample alternative channels for communication of the information." (Pet. App. 42a (quoting *Ward*, 491 U.S. at 791)). Petitioner's arguments to the contrary (Pet. 18-26) distort the court's reasoning and the *Ward* test, and ignore the animating purpose behind the statute.

A. Section 14-202.5 is narrowly tailored.

1. *Ward* held that a content-neutral statute that affects speech need not be the "least restrictive or least intrusive means" of achieving the government's interest. 491 U.S. at 798. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800. To faithfully apply that narrow-tailoring standard, it is necessary to fully

appreciate the state interest the challenged statute is serving.

As discussed in above, §14-202.5 reflects the North Carolina Legislature's recognition that a mere ban on on-line communication between a registered sex offender and minors does not suffice. Rather, as one Web-based child protection tool explains, sex offenders

> use information made available on social networking sites to gather information such as where the child lives, his day to day activities and routines, who he hangs out with, etc. Through the social networking page, the predator is able to gather enough information to commit heinous crimes against children.

Online Predators/Internet Predators, http://www.minormonitor.com/resource/online-predators/ (last visited June 29, 2016).

Further,

> [p]redators who choose their victims through social networking are often hard to identify once the crime takes place. This is especially true if the predator never actually contacted the victim using the social networking site but instead just used it to gain a wealth of information that made the victim an easy target.

Id. Section 14-202.5 is carefully tailored to address precisely those problems.

2. Petitioner is therefore wrong when he posits several other measures that purportedly "could serve [the State's] interests just as well." (Pet. 18 (quoting *McCullen v. Coakley*, 134 S. Ct. 2518, 2537 (2014)). In relying on those other measures, petitioner disregards the statute's purpose and effectively seeks to hold the legislation to the "least restrictive means" test.

For instance, petitioner suggests that the remedy is charging a defendant with the sex crimes that result from the contact. (Pet. 21) At that point, however, the damage is already done, if it is ever detected. This alternative does not adequately serve the protection purpose underlying the statute. When the danger to society, such as sexual predation, is both great and difficult to detect, preventive measures may serve the State's compelling interests. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 207-08 (1992) (upholding ban on campaigning within 100 feet of a polling place); *Renton v. Playtime Theatres*, 475 U.S. 41 (1986) (upholding ordinance prohibiting adult theaters from locating within 1000 feet of residential areas or schools); *Frisby v. Schultz*, 487 U.S. 474, 476, 481-88 (1988) (upholding town ordinance banning picketing "before or about" any residence); *Hill v. Colorado*, 530 U.S. 703, 707, 725-30 (2000) (upholding statute prohibiting certain

speech-related conduct within 100 feet of the entrance to any healthcare facility).

That is why petitioner misses the point when he says (at 12) that he "was convicted for saying 'Thank you Jesus' on an internet site." He was not convicted for saying those specific words; he was convicted for accessing a social networking site that enables sexual predators to "gather information such as where [a] child lives, his day to day activities and routines, who he hangs out with, etc."

Petitioner fares no better in suggesting that the State require social networks to "ensure that minors obtain adult permission before establishing accounts and afford parents ongoing access." (Pet. 3, 21) Even assuming such a law would be constitutional, *but see Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), any marginal reduction in the number of children on those sites would hardly stop predators from gathering information about the many children who remain.

3. Petitioner nonetheless insists that the statute sweeps too broadly, covering too many websites and too many offenders. The former complaint reprises in a different guise the due process argument he no longer directly makes. But North Carolina's statute excludes from its purview all sites other than those through which registered sex offenders can access information about minors by viewing a personal page

containing identifying information about the creator of the page, and which can link to other such pages on the site.[8]

As the Attorney General explained to the courts below, it therefore does *not* encompass cites such as Google.com, Amazon.com, or Foodnetwork.com. *See* New Brief for the State (Appellant) at 35-36. Each of those sites lacks features required by §14-202.5, such as allowing a minor to create a webpage or having webpages that have links to friends that can be accessed by visitors. Similarly, nytimes.com is not covered by the statute because the site does not allow for creation of detailed personal user pages that link to other users' personal pages while also

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[8] The function of linking to other users' pages is the hallmark of a social networking site. To meet the definition of "social networking site" under §14-202.5, the site must allow the user to include all of the information listed in subsection (b)(3), including the ability to link to other users' pages. *See* §14-202.5(b)(3) (using conjunctive "and"). The site must also provide at least one of the communications options listed under subsection (b)(4). *See id.* §14-202.5(b)(4) (using disjunctive "or"). This reading comports with basic principles of statutory construction. *See, eg., Frisby v. Schultz*, 487 U.S. 474, 483 (1988)(statutes to be narrowly read); Larry M. Eig, *Statutory Interpretation: General Principles and Recent Trends* 9 (Congressional Research Service 2011), (use of "and" vs. "or"), *available at* http://fas.org/sgp/crs/misc/97-589.pdf.

providing a message board, chat room, email, or instant messaging platform.

In addition, "as a matter of natural meaning, an educated user of English would not describe" sites such as nytimes.com or Foodnetwork.com as "social networking sites." *See Bond v. United States*, 134 S. Ct. 2077, 2090 (2014) (beginning interpretation of statutory term by looking at the "natural meaning" of the term). And, of course, statutes should be construed "to avoid constitutional difficulties." *Frisby*, 487 U.S. at 482. Moreover, the remedy in the unlikely event some offender were charged with accessing Foodnetwork.com would be to hold the State to its burden of proving the site meets the definition. *See United States v. Williams*, 553 U.S. 285, 305-06 (2008) (noting that in "close cases," the remedy lies not in facially invalidating an allegedly vague statute, but in the requirement of proof beyond a reasonable doubt).

4. Petitioner also faults §14-202.5 for reaching all registered sex offenders, including those who might not have sexually assaulted minors. But the inclusion of select offenses that could have been committed against an adult strongly furthers the purpose of protecting minors.

Research shows a high cross-over rate for types of sexual offenses. Specifically, studies show that adult-victim rapists "often sexually assault

children," with the majority of studies finding "rates in the range of 50 to 60 percent." *Sex Offender Management Assessment and Planning Initiative* [hereinafter "SOMAPI"] 61-62 (Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, October 2014, NCJ 247059), *available at* http://smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf. Studies also show that "incest offenders often sexually assault children both within and outside their family," and that "64-66 percent of incest offenders report sexually assaulting children who they were not related to." *Id.* These "[i]ndiscriminate offenders, also known as mixed offenders, report sexually abusing both adults and children equivalently." *Id.* at 65. "Taken together, crossover findings suggest that traditional typologies based on victim type may not be useful to allocate resources, evaluate risk, or devise individualized treatment interventions." *Id.* at 63. Given this research, it would be foolish to assume that a sex offender bold enough to assault an adult does not present a danger to a 16-year-old.

Petitioner is on even weaker ground when he suggests that registered sex offenders pose no greater risk than members of the general public. (Pet. 23 & n.6) Not surprisingly, no lower court in this case made a finding of fact with respect to that

unsupported and astonishingly counter-intuitive claim. And the claim merits little credence, in large part because recidivism rates do not nearly reflect the actual rate of re-offense by sex offenders.

Because of the shame and degradation peculiar to sex crimes, sexual offenses are grossly under-reported crimes. *See* National Institute of Justice, "Reporting of Sexual Violence Incidents."[9] Researchers on recidivism "widely agree that observed recidivism rates are underestimates for the true reoffense rates of sex offenders" due to the low frequency with which sex crimes are reported and the large number of sex crimes that are unsolved or not prosecuted. *See* SOMAPI at 89-91.

Under conditions of guaranteed confidentiality, for instance, one study showed that only 3.3 percent of actual hands-on sex offenses, such as rape or child molestation, resulted in arrest. *Id.* at 91. Another study showed that only 5 percent of rapes and child sexual assaults self-reported by offenders during treatment actually were reflected in official records. *Id.* When polygraphs were used, the number of victims reported by incarcerated sex offenders rose

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[9] The report is *available at* http://www.nij.gov/topics/crime/rape-sexual-violence/pages/rape-notification.aspx. The reports cites C.M. Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992–2000* (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, August 2002, NCJ 194530).

from the average of 2 reported in official records to an average of 18. *Id.* at 61. The average number of offenses to which sex offenders admitted to committing rose from 12 to 137. *Id.* And although petitioner correctly reports that sex offenders had a lower overall re-arrest rate than non-sex offenders, their sex-crime arrest rate was four times higher than the rate for non-sex offenders. *Id.* at 93.

This Court was therefore on solid ground when it recognized that "when convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sex assault." *Conn. Dep't of Pub. Safety*, 538 U.S. at 4 (internal quotation marks omitted). And certainly far more likely than a member of the general public.

5. Having criticized the statute for its breadth, petitioner turns around and faults the statute for its exclusion of websites that provide solely a chat room, message board platform, email, photo-sharing, or instant messenger. (Pet. 23-24) Yet inclusion of sites with only one such feature would effectively have banned most sites on the Web, an outcome the legislature carefully tried to avoid. Moreover, discrete chat room or messaging services do not contain the transparent level of personal information and photographs available on social networking sites. Nor can users of a chat room or messaging service remain invisible to others participating in the

feature. North Carolina thus specifically exempted sites whose inclusion would not significantly further the legislation's purpose but would render the statute too far-reaching—just as one would want a state legislature to do.

B. Section 14-202.5 leaves ample alternative channels of communication.

With its narrow definition of "social networking sites" and exemptions for sites that do not significantly further its purpose, North Carolina's legislation leaves open ample "alternative channels for communication"—and not just generally, but on the Internet.

A sex offender may use any of the sites that do not fall under the definition of "commercial social networking sites" that allow members under the age of 18. This includes social networking sites for adults only, social networking sites with limited features, non-commercial social networking sites, and government sites. A sex offender can create his own webpage, blogs, and podcasts, and visit those of others. He may take out an advertisement on any site on the Internet, use a mail exploder to send his messages, or have a friend post a message on Facebook and directly attribute the message to him. He can navigate to and post on popular sites like Salon.com, Slate.com, and Huffington post.com. He can go to commercial sites like eBay, Yelp, and

Amazon.com. North Carolina's statute leaves open myriad alternative means for Internet speech.

Petitioner insists, however, that social networking sites are unique and that "it is essentially definitional that equivalent 'alternatives' will not exist." (Pet. 25) That cannot be the test. If an alternative channel of communication had to be a perfect substitute, few if any time, place, or manner restrictions would be upheld. All litigants challenging restrictions on a particular channel of communication prefer that channel to others based on its particular features. But the First Amendment allows the government to restrict access to particular means of communication where ample *alternative* ways to communicate remain.

While no single "alternative channel" may equal Facebook's special appeal to those who use it, the vast array of different sites that remain available to sex offenders—but on which minors cannot be easily and invisibly identified—provides ample alternative channels of communication to Facebook and its kindred.[10]

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[10] Both petitioner and his amici fault the North Carolina Supreme Court for providing some specific examples of alternative websites still available to registered sex offenders. (*See* Pet. 24 (citing Pet. App. 17a-18a); Law Professors Amicus Br. 10) They fail to recognize that the court was addressing petitioner's specific examples of sites he imagined to be off-limits. The court was

The principal case upon which petitioner's amici rely, *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), is far afield from this case. (*See* Law Professors Amicus Br. 9-12) *City of Ladue* involved a ban on residential signs, a means of communication this Court found to be "venerable" and "both unique and important" based on the distinct message such signs convey, their affordability, and the "special respect for individual liberty in the home." *Id.* at 54-58. Banning access to Facebook cannot be compared to a government effort to limit an individual's ability to speak on his own property.

Nor, finally, are amici correct that this Court's intervention is needed to resolve a disagreement among lower court decisions about how ample alternative channels should be understood. (Law Professors Amicus Br. 12) The different results in the cases discussed by amici are exactly what one would expect when a general legal standard is applied to widely varying statutes and rules. There is no reason to believe the courts in the two supposedly competing camps would not have decided all the cases precisely the same way.

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demonstrating that even if petitioner were correct in asserting, for example, that Foodnetwork.com fits the definition of a "commercial social networking site" (it does not), petitioner could use pauladeen.com for his food interests; even if he were correct in asserting that the nytimes.com is a "commercial social networking site" (it is not), he could obtain the news from other websites.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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